

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA L. WATSON and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 01-1000; Submitted on the Record;
Issued December 17, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 11, 2001 on the grounds that her work-related disability had ceased on or before that date.

On May 22, 1999 appellant, then a 37-year-old laborer/custodian sustained a lower back injury in the performance of duty when she lifted a trash bag and pushed a large plastic container during the trash collection.¹ Appellant stopped work on July 21, 1999.

On November 18, 1999 the Office accepted appellant's claim for aggravation of lower back pain.

Appellant provided numerous attending physician's reports from Dr. Tamarapu M. Srikrishnan, Board-certified in physical medicine and rehabilitation. He checked the box "yes" with regard to whether he believed the condition was caused or aggravated by appellant's employment activity and indicated that appellant was disabled. Other than writing in "aggravated," he did not provide any explanation in any of his reports on causal relationship.²

In a fitness-for-duty examination dated November 22, 1999, Dr. Salvatore Galante, a Board-certified family practitioner, stated that his impression was that appellant had a "mild, chronic lumbar strain without any objective findings and definite symptom magnification." He stated that appellant could return to the full duties of her job as a custodian without any

¹ The record reflects that appellant is a disabled veteran with a 30 percent service-connected disability, 10 percent back strain, 10 percent flatfoot condition and 10 percent migraine headaches.

² The record contains records from preexisting reports of psychiatric examinations and her previous low back injury, left knee injury and chest pain.

difficulties and that she did not appear to be disabled at all. Dr. Galante further stated that appellant did not need any restrictions on a temporary or permanent basis.

In a November 22, 1999 decision, the Office denied appellant's claim for continuation of pay, finding that she had not submitted her form within the 30-day time frame.

On January 24, 2000 the Office referred appellant along with a statement of accepted facts and a copy of the case record to Dr. Melvin M. Brothman, a Board-certified orthopedic surgeon, for a second opinion evaluation as to the nature and extent of appellant's work-related disability.³ In a January 24, 2000 report, Dr. Brothman stated that he had examined appellant and noted her history of injury and treatment, which included chronic back pain. He diagnosed "chronic low back pain aggravated by injury of this folder." Dr. Brothman further opined that based on her long-term chronic history and her present findings, she had reverted to her preinjury status, that her aggravation was not permanent and further treatment as a result of the work-related injury was not warranted. Dr. Brothman further stated that appellant was unable to return to her normal job, however, she was capable of performing light duty while avoiding excessive standing, bending or lifting for more than four hours and no lifting over 15 pounds on a repetitive action. He further opined that appellant had unrelated issues such as an anxiety disorder and that she should be evaluated by a specialist in physical medicine to treat her prior chronic low back pain.

In a February 17, 2000 electrodiagnostic consultation, appellant's physicians determined that she had minimal criteria of left cervical and left L5, S1 radiculopathy and normal bilateral ulnar motor and sensory study.

To resolve a conflict in the medical evidence, the Office referred appellant to Dr. Donald J. Nenno, II, a Board-certified orthopedic surgeon. In his March 28, 2000 report, he noted appellant's prior history of injury and treatment and stated that appellant was discharged from the service as a result of her back pain and that appellant had chronic back pain at the start of her service with the employing establishment. Dr. Nenno reviewed the record and noted that electrodiagnostic studies done in February 2000 showed minimal findings of an L5-S1 radiculopathy while a magnetic resonance imaging from December 1998, which preceded the injury, showed some mild disc bulging at L4-5 and L5-S1. He further noted that appellant's complaints were largely subjective in nature, with little objective findings and opined that appellant would have a permanent deficit on the basis of her chronic complaints in her back which he felt were unrelated to her work injury of 1999, but continued from the mid 80's at least. Dr. Nenno stated that a functional capacity evaluation might be appropriate in order to improve her functional abilities.

In a July 11, 2000 report, Dr. Srikizishnan, added that possible lifting over 70 pounds aggravated appellant's condition along with repeated pushing and pulling. He stated that appellant's period of total disability was from October 22, 1996 to September 30, 2000. Dr. Srikizishnan did not advise returning to work.

³ The record reflects that the Office initially selected another physician, however, after some discrepancy with appellant's attorney, the doctor refused to see appellant.

In an October 24, 2000 attending physician's report, Dr. Srikizishnan again checked the box "yes" indicating that appellant's condition was caused or aggravated by an employment activity. He circled the word "aggravated" and wrote "see above." In the boxes above he indicated that appellant suffered from low back pain in 1982 when she fell down the stairs during training and that it worsened when she lifted and carried over 70 pounds of mail. He diagnosed chronic low back pain with L5-S1 radiculopathy and chronic neck pain and spondylosis with lumbar radiculopathy. Dr. Srikizishnan stated that appellant was temporarily totally disabled and could not return to her previous position.

On November 16, 2000 the Office issued a proposed notice of termination of compensation. The Office advised appellant that her compensation for wage-loss and medical benefits was being terminated because she no longer had any continuing injury-related disability. The Office indicated that the weight of the medical evidence, as demonstrated by the opinion of Dr. Nenno, demonstrated that appellant's work injury had resolved. Appellant was given 30 days to submit additional evidence or argument.

In letters dated November 26, 28 and December 12, 2000, appellant responded to the proposed notice of termination by including copies of materials, which were previously submitted, along with physical therapy notes, diagnostic reports and additional reports from her attending physician dated December 8 and 12, 2000, and January 18, 2000 and an undated progress note which was received by the Office on January 20, 2000. None of these reports contained any discussion of how appellant's condition was related to the accepted employment injury as opposed to her chronic preexisting conditions.

By decision dated January 11, 2001, the Office finalized its proposed termination of benefits on January 23, 2001. The Office indicated that Dr. Nenno's opinion remained the weight of the medical evidence.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed her appeal with the Board on February 27, 2001, the only decision properly before the Board is the January 23, 2001 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective January 23, 2001 on the grounds that her work-related disability had ceased by that date.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ The Office's burden includes the

⁴ 20 C.F.R. § 10.607(a) (1999).

⁵ *Lawrence D. Price*, 47 ECAB 120 (1995).

⁶ *Id*; see *Patricia A. Keller*, 45 ECAB 278 (1993).

necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

In this case the Office accepted that appellant sustained an aggravation of low back pain and paid appropriate medical benefits.

Appellant's physician, Dr. Srikizishnan reported that appellant had continuing total disability, while Dr. Brothman, the physician to whom appellant was referred for a second opinion indicated that appellant had a temporary aggravation of her chronic low back condition which had reverted to her preinjury status and that further treatment as a result of her work-related injury was not warranted. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of her accepted injuries and remained disabled for work, the Office referred appellant to Dr. Nenno, for an impartial examination.⁸

The Board finds that at the time the Office terminated benefits, the weight of the medical evidence rested with Dr. Nenno, who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant had no continued disability from her accepted employment injury and was capable of performing her usual employment and that further medical treatment was unnecessary. Dr. Nenno noted that the electrodiagnostic studies in February 2000 showed minimal findings at the L5-S1 range and the MRI from December 1998, which predated the injury, showed some mild disc bulging at L4-5 and L5-S1. He also observed subjective complaints from appellant when he performed specific tests on her and noted that there were little objective findings to substantiate appellant's complaints. Dr. Nenno concluded his report by indicating that appellant's chronic complaints, which were unrelated to the work injury in 1999, would most likely be permanent.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹ The Board finds that the report of Dr. Nenno represents the weight of medical opinion in this case and contains a well-rationalized opinion negating any continuing residuals due to the accepted employment injuries. As the weight of the medical opinion evidence, Dr. Nenno's report justifies the Office's termination of appellant's compensation benefits effective January 11, 2001.

Appellant submitted additional reports from her treating physician dated July 11, October 24, December 8 and 12, 2000, January 18, 2000 and an undated report which was received by the Office on January 20, 2000. Dr. Srikrishnan continued to state that appellant

⁷ *Raymond W. Behrens*, 50 ECAB __ (Docket No. 97-1289, issued January 14, 1999).

⁸ 5 U.S.C. § 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes*, 43 ECAB 510 (1992).

⁹ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

was disabled and could not return to her preinjury job. However, he did not explain how and why the accepted employment injury would continue to cause appellant's continuing disability for work or how the employment injury would have caused her condition. Dr. Srikrishnan did not explain how she continued to be disabled due to the employment injury as opposed to her preexisting history of chronic back pain from the 80's or her other preexisting conditions. Without such medical rationale addressing the crucial issues of causal relationship and continuing disability, his reports are of greatly diminished probative value.¹⁰

Consequently, appellant has not established that her condition on and after January 11, 2001 was causally related to her accepted employment injury.¹¹

The decision of the Office of Workers' Compensation Programs dated January 23, 2001 is hereby affirmed.

Dated, Washington, DC
December 17, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹⁰ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

¹¹ In her appeal, appellant provided additional medical reports, however, the Board cannot consider new evidence on appeal. Appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. 10.606(b)(2) (1999); *see* 20 C.F. R. § 501.2(c).